BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LUCAS H. WENDEL	)	
Claimant	)	
V.	)	
	)	
MORTON BUILDINGS, INC.	)	
Respondent	)	Docket No. 1,071,376
AND	)	
	)	
AMERICAN ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the November 10, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. W. Walter Craig of Derby, Kansas, appeared for claimant. Samantha Benjamin-House of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 5, 2014, preliminary hearing and exhibits thereto; the transcript of the October 22, 2014, discovery deposition of claimant; the transcript of the November 5, 2014, deposition of LaVern Durst and exhibit thereto; the transcript of the November 5, 2014, deposition of Donald Hizar and exhibit thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant's amended Application for Hearing alleged he sustained an injury on or about August 22, 2014, and each and every day worked thereafter and on September 17, 2014, and each and every day worked thereafter through September 22, 2014. Respondent asserted claimant sustained a single traumatic accident on August 22, 2014, but did not provide notice until September 23, 2014, which was untimely. The ALJ found:

> After considering all the evidence presented, it is found that the claimant had 20 days from August 22nd, 2014, or September 11th, 2014, to report his injury. The claimant knew he injured his back on the 22nd as he has relayed that date to numerous medical providers. He told the chiropractor on September 3rd that he

> probably did it at work. He did not fill out an accident report until September 23rd which is also the day he told Mr. Hizer *[sic]*, the Area Crew Supervisor for the respondent. The 24th of September is the day that Mr. Durst, the Construction Center Manager became aware that the claimant was claiming a work related injury. The claimant failed to give timely notice of his injury.[1]

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent two separate time periods. He commenced working for respondent the second time in August 2013 as a foreman. His direct supervisor was LaVern Durst, an office manager. Another supervisor was area crew supervisor Donald "Donny" Hizar. Claimant indicated he was required to contact Mr. Hizar three times a week to report building progress. Claimant confirmed that he watched orientation videos concerning the building process when he was hired in 2013. Once a week, a "toolbox talk" was held in the office to discuss safety and other issues. Claimant was uncertain whether the procedure to report a work injury was covered during orientation or during a toolbox talk.

Claimant testified that if a member of his crew was injured and required an ambulance, it was his understanding he was supposed to notify Mr. Hizar, Mr. Durst and the field safety person, Curtis Bolander. If there was no ambulance, the foreman would fill out a report with the employee. If a foreman was injured, the procedure was to report just the same and to file the report. If the procedure for an injured crew member is not followed, the foreman gets written up. According to claimant, termination follows three write-ups.

On August 22, 2014, claimant started noticing persistent back pain while setting concrete lower columns on a building. He testified setting the lower columns was a one-man job and they weighed 100 to 150 pounds. He indicated it was typical in the field for one's back to hurt. Claimant testified there were two foremen on the job – he and Ryan Snodgrass. Claimant explained there were two foremen because respondent only had enough individuals for one four-person crew. According to claimant, both he and Mr. Snodgrass were getting foreman pay, but Mr. Snodgrass' name was listed on the paperwork as foreman. Claimant indicated Mr. Snodgrass completed payroll records for the crew that day and sent them to Mr. Hizar.

Claimant testified that on August 22, 2014, he told Mr. Snodgrass, lead man Joshua Smith and the salesman for the job, Josh Noel, of having back pain from setting the lower

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[1] ALJ Order at 4-5.

columns. The next day, claimant returned to work and his tasks included setting the splashboard around the exterior of the building. He continued to work his regular duties through September 22, 2014. Claimant testified he first sought treatment for his back from Dr. Jerome Greene, a chiropractor, on September 3. Claimant indicated his back pain went away around September 16 or 17. At the end of the workday on September 17, while driving home, claimant began having left leg numbness. Earlier that day at work, claimant had done a roof repair.

Claimant testified that between August 22 and September 17, 2014, he told Mr. Durst of having back pain, but did not request medical treatment. According to claimant, on September 3, he was approached by Mr. Durst and asked if he was going to work. Claimant indicated he had to, as he had no vacation or sick leave. Claimant believed Mr. Durst made the query because of the way claimant was walking.

According to claimant, he took himself off work on September 23, 2014, due to lower back and left leg pain. He completed an accident report on September 23, indicating his back injury occurred on August 22, 2014. Claimant acknowledged he first told Mr. Hizar of his work injury on September 23. He testified he was terminated on October 6, 2014, for alluding to a co-worker that his injury was personal and not work related.

At the preliminary hearing, the accident report completed by claimant was made part of the record. In the section that asked to describe what happened, claimant indicated that while setting/adjusting lowers, his low back began hurting. The next three days he worked on a roof and his low back was still hurting. After two weeks his back still hurt and he went to a chiropractor. Claimant noted the back pain was worsening and transpired into his left leg.

Mr. Durst confirmed he was claimant's supervisor. On September 23, he saw claimant could hardly walk and could tell his back and leg were hurting and asked him what was wrong. They spoke about claimant's back, but claimant never indicated he had a work injury. Mr. Durst testified he held claimant back from going to the job site because he was unfit to work. Mr. Durst encouraged claimant to get medical treatment. On Thursday, September 25, Mr. Durst learned claimant filed a workers compensation claim. Claimant, according to Mr. Durst, was to report work injuries to him and the area crew supervisor. Mr. Durst testified that on October 1, 2014, he prepared a written statement of what transpired. The following Monday, October 6, at the direction of human resources, he terminated claimant for claimant alluding to other employees that he had a workers compensation injury when it was personal.

Mr. Hizar testified he was claimant's supervisor. He testified he lived in Winfield and on average six to eight days per month would travel to the Garden City office from which claimant worked. He and claimant would speak two or three times a week. Mr. Hizar testified that every Monday morning a safety meeting is held called "Tool Box Talks." Prior to August 22, Mr. Hizar disciplined claimant on at least two occasions for safety violations.

He also had conversations with claimant prior to August 22 on the importance of reporting work injuries. Mr. Hizar indicated he first became aware on September 23, 2014, claimant was alleging a work injury when they had a telephone conversation claimant initiated. Claimant indicated he did not know when he got hurt. He never gave August or September as a date of injury. In a phone call on September 26, claimant asked Mr. Hizar if he recalled claimant telling him of an injury. Mr. Hizar indicated his response was no.

Mr. Hizar also prepared a written statement on September 28, 2014. The written statement indicated he received a telephone call from claimant on September 23, 2014, stating his back was hurting, he needed to see a doctor and have an MRI. The written statement also indicated Mr. Hizar was asked by claimant in a September 26 telephone call if he remembered claimant telling him he was injured on August 26, 2014. Mr. Hizar told claimant at that time that claimant had told him nothing of an injury at any time and the first he had heard of claimant's injury was on September 23, 2014.

At the preliminary hearing, claimant's medical records concerning his treatment and evaluation were introduced into the record. The nature of claimant's medical treatment is irrelevant to the issue of notice. However, what claimant told medical providers concerning how his back injury occurred is germane.

Dr. Greene's notes from his initial visit with claimant on September 3, 2014, indicated claimant reported having quite a bit of pain in his lower back while sleeping, sitting or bending over. Claimant reported his back had been sore for about 1½ weeks. In the history the doctor stated, "He is very active at work and that probably did it."[2] There is no mention of a specific cause of injury, nor a date of injury. However, the note indicates the onset of symptoms was acute and the cause of symptoms was unknown. Dr. Greene saw claimant again on September 18, 22, 23 and 25. At the September 18 visit, claimant reported pain down his left leg. At the September 22 visit, claimant reported severe shooting pain down his left leg. The September 22 notes indicated the leg pain was a new symptom the last two to three weeks. Notes from the September 18, 22 and 23 visits indicate the onset was acute and the cause of symptoms was unknown. None of the notes indicate claimant provided a specific date of injury or cause of injury. Dr. Greene provided no restrictions for claimant, but on September 23, indicated claimant should work as pain allows. In a letter dated September 30, 2014, addressed "To Whom It May Concern," Dr. Greene stated claimant indicated he probably did something at work, but claimant did not report a specific event or date.

Dr. Greene ordered a lumbar MRI, which showed a large central and left paracentral focal disc protrusion at L5-S1 with impingement of the left S1 nerve root. Dr. Greene referred claimant to Dr. Matthew N. Henry, a neurosurgeon. Dr. Greene, in a September 29, 2014, referral letter to Dr. Henry, indicated claimant's symptoms increased

[2] P.H. Trans., Cl. Ex. 2.

over the course of his visits with Dr. Greene, including left leg pain that radiated into the foot. Claimant was seen by Dr. Henry on October 1, 2014. The records of Dr. Henry indicated claimant sustained a work injury on August 22, 2014, from heavy lifting and the pain in his left leg started around September 18 and worsened. Dr. Henry prescribed medications and physical therapy and if claimant did not improve, the doctor recommended a left L5-S1 microdiskectomy and left L4-L5 medial facetectomy and foraminotomy. On October 1, 2014, Dr. Henry took claimant off work until October 15, 2014, at which time claimant would be released to work with a 25-pound weight restriction, and with no restrictions effective November 22, 2014.

On September 26, 2014, claimant saw Randall K. Cundiff, APRN. Notes from that visit indicate claimant had back pain from moving and setting cement columns on August 22, 2014. The September 26 notes also indicate claimant reported he had sharp left lower back pain the day before while climbing roofs and such.

At the request his counsel, on October 7, 2014, claimant was examined by Dr. David W. Hufford, an occupational medicine/sports medicine specialist. According to Dr. Hufford, claimant gave a history of setting support columns on August 22, 2014. On that day, claimant lifted as many as eight support columns, which required squatting and forward flexion. As claimant performed the activity, he noticed gradual and increasing low back pain that persisted until he sought chiropractic care on September 3. Claimant did not report this as a work injury. Claimant reported a chiropractic adjustment significantly improved his condition with minimal to no residual pain. On September 18, claimant was installing a roof with repetitive lifting, bending, stooping, twisting and turning in axial torsion, which resulted in renewed low back pain and a strong left leg radicular component that had not been present until that time. The pain became increasingly severe, until he was unable to work on September 23, 2014, at which time he reported it as a work injury.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

K.S.A. 2013 Supp. 44-508, in part, provides:

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[3] K.S.A. 2013 Supp. 44-501b(c).

[4] K.S.A. 2013 Supp. 44-508(h).

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-520 states, in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

In order to determine if claimant gave timely notice, there first must be a determination if claimant sustained a low back injury as the result of a single traumatic accident on August 22, 2014, as the ALJ found, or as the result of an injury by repetitive trauma.

Claimant indicated he began noticing low back pain while he was setting lower columns on August 22, 2014. He did not testify that a particular activity caused him sudden pain or a sudden onset of symptoms. Dr. Greene indicated the cause of symptoms was unknown and claimant had not reported a specific date of injury. From claimant's description of events, Dr. Greene thought claimant likely injured himself at work. Dr. Henry's records reflect that claimant reported an initial back injury on August 22, 2014, with left leg pain commencing on September 18, 2014. Claimant provided similar information to Mr. Cundiff. Dr. Hufford indicated claimant was performing repetitive job activities on August 22, 2014, when he noticed gradual and increasing low back pain. Drs. Greene and Hufford indicated claimant's low back pain worsened from August 22 through September 22, including the additional symptom of left leg radiculopathy. That convinces this Board Member that claimant sustained an injury by repetitive trauma and not by accident as defined by K.S.A. 2013 Supp. 44-508(d).

Next, the date of injury must be determined. K.S.A. 2013 Supp. 44-508(e) lists four triggering events for a date of injury by repetitive trauma. Claimant was taken off work and given future restrictions by a physician, Dr. Henry, but not until October 1, 2014. There is insufficient evidence in the record to establish a physician advised claimant his low back

injury was work related. The first event triggering claimant's date of injury under K.S.A. 2013 Supp. 44-508(e) was claimant's last day of work, September 22, 2014. Therefore, claimant's date of injury was September 22, 2014.

This Board Member finds claimant gave notice either on August 22, 2014, or September 23, 2014. On August 22, claimant and Mr. Snodgrass were foremen on a job. Claimant's testimony that he told Mr. Snodgrass of injuring his back while working is undisputed. According to claimant, Mr. Snodgrass' name was on the job and he was responsible for time cards and everyone getting paid. That implies Mr. Snodgrass was the lead foreman on August 22, 2014. Under respondent's policy, it was Mr. Snodgrass' duty to notify Mr. Hizar and Mr. Durst of claimant's low back injury. There is no evidence respondent's policy on reporting work injuries was written, as a written policy was not placed into evidence.

Even if claimant did not provide notice of his work injury on August 22, 2014, he did so on September 23, 2014. On that date, claimant completed an accident report for respondent, thus satisfying the requirements of K.S.A. 2013 Supp. 44-520(a).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, the undersigned Board Member reverses the November 10, 2014, preliminary hearing Order entered by ALJ Fuller by finding claimant provided timely notice of his injury by repetitive trauma. This matter is remanded to the ALJ to determine if claimant is entitled to medical benefits and temporary total disability benefits.

IT IS SO ORDERED.

Dated this ____ day of January, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[5] K.S.A. 2013 Supp. 44-534a.

[6] K.S.A. 2013 Supp. 44-555c(j).

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